2012 IL App (5th) 100055-U

NO. 5-10-0055

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 09-CF-333
	)	
RAJAH H. PEACOCK,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The court erred in failing to conduct any inquiry into the defendant's *pro se* allegations that trial counsel was ineffective for failing to present exculpatory evidence, communicate adequately with the defendant, or sufficiently cross-examine the State's witnesses. Remand is needed for *Krankel* inquiry.

¶ 2 The defendant, Rajah H. Peacock, appeals his conviction for unlawful delivery of cocaine. He argues that (1) the court erred in failing to conduct an adequate inquiry into his *pro se* allegations of ineffective assistance of counsel and (2) he is entitled to a credit of $5 per day against his fines for time spent in custody prior to sentencing. We remand the cause for further proceedings.

¶ 3 The defendant was charged with unlawful delivery of cocaine within 1,000 feet of a church. The charge stemmed from an investigation that involved the help of a police informant who was paid to make controlled drug buys. The informant, Julie Shotts, began working with police as a confidential informant when she was confronted by police with the

fact that they were aware that drugs were being sold from the apartment she shared with her boyfriend, Sean Miller.

¶ 4 In June 2008, Officers Greg Hanisch and Glenn Rountree were members of a police drug task force. They were investigating a man named Matthew Wagner. On June 3, Julie Shotts contacted Rountree and informed him that she had arranged to buy cocaine from Wagner later that day. Her plan was to meet him in Harrisburg while he was passing through the area. However, Wagner later called Shotts to tell her that he would not be in town at the time she had arranged to buy the cocaine. According to Shotts, Wagner suggested that she instead buy cocaine from either the defendant or a dealer known as "Turtle." When she told police about this development, they told her to buy from the defendant. According to Officer Rountree, however, Shotts said that Wagner told her she could get the cocaine at the defendant's house. Shotts informed police that she did not know the defendant well enough to buy drugs from him and would therefore need to involve Sean Miller. Although Miller was not aware that Shotts was working as an informant, he was involved in three of her controlled buys.

¶ 5 Miller went to the defendant's house alone to find out if he could buy cocaine. Shotts, meanwhile, met with Rountree, Hanisch, and two other officers to set up the controlled buy. While Shotts was with the officers, Miller called her and told her that he would be able to buy cocaine for her. Officers searched Shotts, fitted her with a listening device, and gave her $1,000 to make the purchase. They drove her to a parking lot near the defendant's home, and she walked to the defendant's house from there. She returned 12 minutes later with a package of cocaine. Officers then searched her again and interviewed her.

¶ 6 At the defendant's November 2009 trial, Shotts testified that when she arrived at the defendant's house to make the buy, the defendant and Miller were outside lifting weights. Miller approached her, she gave him the money, and he counted it. Miller and the defendant

then went inside the house. Shotts waited outside for them. She testified that she saw Miller hand the money to the defendant just before they walked into the house. Shotts stated that the defendant and Miller were inside the house for five minutes, and Miller handed her a packet of cocaine when he came out.

¶ 7 The recording of Shotts' visit to the defendant's house was played for the jury. On it, two voices can be heard near the recording device–one male voice and one female voice. At least one or two other male voices, a barking dog, and the voice of a young child can be heard in the background. The man and woman whose voices sound close can be heard discussing money, and at one point the woman calls the man "Sean." It is difficult to hear what is being said by any of the other people whose voices were recorded.

¶ 8 Four witnesses testified to identify the voices they could recognize on the recording. The defendant's wife, Amanda Peacock, testified that she recognized the voices of the defendant, Sean Miller, one of her young twin daughters, and two other male friends, Steve Napier and Carlos Flowers. She explained that she knew Miller because he was her aunt's ex-husband. She further testified that it was common for Miller to visit the Peacocks' home to lift weights with the defendant. Peacock testified that she only heard the defendant discussing weight-lifting. She further testified that she was home when the events at issue took place. She stated that at one point, she saw Shotts and Miller stand together off to the side away from the weight bench, and she did not see Miller enter the house.

¶ 9 Asher Ben Robinson was married to Amanda Peacock's sister. He testified that he recognized the voices of Sean Miller and Steve Napier on the recording. He thought that he, too, was present that day. He testified that the only voices on the recording he heard discussing money were those of Miller and the only woman on the recording.

¶ 10 Mary Miller was Amanda Peacock's aunt and Sean Miller's ex-wife. She testified that she recognized the voices of the Peacocks' twin daughters, Miller, and a woman named Julie.

She further testified that she heard only Miller and the woman named Julie discussing money. Finally, Jamie Wambugu testified. She was the Peacocks' neighbor. She testified that the defendant's voice was not the "main voice" that she heard in the recording.

¶ 11 The jury returned a verdict of guilty. After trial but prior to sentencing, the defendant sent several letters to the court, three of which are pertinent to this appeal (we note that the defendant sent additional letters to the court requesting furloughs from prison to be able to spend time with his mother, who was ill). In a December 8 letter, the defendant stated that he had been trying to reach his attorney so that he could "start [his] appeal process," but his attorney seemed to be "dodging" him. The letter further stated that the defendant had exculpatory evidence that his attorney did not present at trial, and that his attorney refused to raise issues that the defendant asked him to raise. The defendant went on to allege that counsel did not protect his right to a trial by a jury of his peers where all of the jurors were over 40 years old and seven jurors were over 60 years old. He also complained that counsel refused to put all three of the State's witnesses back on the stand to prove they were lying. Finally, the defendant informed the court that he wished to file an appeal, but wanted a different attorney to help him because he had received ineffective assistance at trial.

¶ 12 The defendant's second letter was dated December 15. In it, he alleged that he was trying to reach his attorney because he had questions regarding his upcoming sentencing hearing, but that counsel had not "tried to respond" to the defendant's messages. He then repeated his allegations of ineffective assistance from his first letter. This time, he specifically alleged that "Ms. Shotts lied about a number of things that didn't even get brought up." The defendant's third letter was dated December 17. This time he alleged that a witness lied to the grand jury that indicted him and that he believed he was framed.

¶ 13 The court held a sentencing hearing in January 2010. The defendant's letters to the court were never mentioned. The court sentenced the defendant to 12 years in prison and

ordered him to pay various fines and fees. In relevant part, the court ordered the defendant to pay a $3,000 drug assessment fine and a $1,000 street value fine. The court gave the defendant credit against his sentence for the 133 days he spent in custody prior to the sentencing hearing and noted that he was entitled to a credit of $5 per day against his fines. However, the mittimus did not reflect the $5-per-day credit. This appeal followed.

¶ 14 This case involves what has become known as a *Krankel* inquiry. In *People v. Krankel*, a defendant filed a *pro se* motion for a new trial alleging ineffective assistance of counsel. Defense counsel also filed a motion for a new trial. *People v. Krankel*, 102 Ill. 2d 181, 187, 464 N.E.2d 1045, 1048 (1984). At a hearing on counsel's motion, the defendant was given the opportunity to present his claim to the court (*Krankel*, 102 Ill. 2d at 187, 464 N.E.2d at 1048); however, the court denied counsel's request for a continuance so that another attorney could be appointed to represent the defendant at a hearing on his ineffective assistance claim (*Krankel*, 102 Ill. 2d at 188, 464 N.E.2d at 1048). The defendant explained to the court that his attorney had failed to present an alibi defense. *Krankel*, 102 Ill. 2d at 188, 464 N.E.2d at 1048-49. The issue in *Krankel* was not whether this preliminary inquiry was sufficient; the issue was whether the court erred in refusing to appoint counsel and hold a hearing to fully resolve the defendant's claim of ineffective assistance. *Krankel*, 102 Ill. 2d at 188, 464 N.E.2d at 1049. Here, the question is whether the trial court made an adequate preliminary inquiry into the defendant's claims. Since *Krankel*, our supreme court has developed the following rules to guide us in making this determination.

¶ 15 When a defendant makes a *pro se* allegation of ineffective assistance of counsel, the trial court must make at least some initial inquiry into the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). If, after making this inquiry, the court determines that the claim has no merit, the court may deny the defendant's motion without appointing counsel. If, on the other hand, the defendant's

allegations demonstrate even possible neglect of the case, the court must appoint new counsel, who will then present the defendant's claim of ineffective assistance. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 16 The supreme court went on to provide some guidance in assessing whether a trial court's inquiry was adequate. The court explained that in most cases, at least some discussion between the trial court and the defendant or defense counsel is necessary. This allows the court to ask about the facts and circumstances surrounding the defendant's allegations. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. In some cases, "the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. However, in such cases there should at least be some indication in the record that the court did in fact consider the defendant's allegations. See *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638.

¶ 17 In *Moore*, the defendant told the trial court numerous times before trial that he wished to be represented by an attorney other than his appointed public defender. *Moore*, 207 Ill. 2d at 75-76, 797 N.E.2d at 636-37. He filed a *pro se* pretrial motion requesting that a different attorney be appointed to represent him. In it, he alleged that counsel failed to fully investigate the facts, file pretrial motions, and consult with the defendant. *Moore*, 207 Ill. 2d at 76, 797 N.E.2d at 637. There was no indication in the record that the trial court took any action at all on this motion. *Moore*, 207 Ill. 2d at 76, 797 N.E.2d at 637. The defendant subsequently filed a *pro se* posttrial motion requesting new counsel and raising several claims of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 76-77, 797 N.E.2d at 637. At the sentencing hearing, defense counsel called the defendant's *pro se* motion to the trial court's attention (*Moore*, 207 Ill. 2d at 74, 797 N.E.2d at 635), but the court refused to consider it (*Moore*, 207 Ill. 2d at 70, 797 N.E.2d at 633). The court told the defendant that

if he filed an appeal, a new attorney would be appointed to represent him on appeal. The court did not address the allegations in the motion. *Moore*, 207 Ill. 2d at 74, 797 N.E.2d at 635.

¶ 18 On appeal, the supreme court easily found that the trial court's inquiry was inadequate because the trial court "conducted no inquiry of any sort into [the] defendant's allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. The court noted that "the record does not show whether the trial court ever read" the defendant's motion. *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. The court explained that on remand, the court should make a preliminary inquiry into the defendant's claims. If the court determined that the claims lacked merit, it could then deny the defendant's motion and allow his conviction to stand. *Moore*, 207 Ill. 2d at 81, 797 N.E.2d at 639-40. If, on the other hand, the court found that the claims required further consideration, it would be required to appoint a new attorney, who would then present the defendant's claims at a hearing in the matter. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 19 Recently, a panel of the Appellate Court, First District followed *Moore* in *People v. Vargas*, 409 Ill. App. 3d 790, 949 N.E.2d 238 (2011). There, defense counsel informed the trial court that the defendant wanted to supplement counsel's previously filed posttrial motion with two allegations of ineffective assistance of counsel. The court told counsel that the motion could be supplemented, but it had to be done in writing. *Vargas*, 409 Ill. App. 3d at 799, 949 N.E.2d at 247.

¶ 20 After addressing the motion filed by defense counsel, the court turned its attention to sentencing. Defense counsel told the court that the defendant wanted to address the court. The court did not allow the defendant to do so until he was given the opportunity to speak in elocution at the end of the sentencing portion of the hearing. *Vargas*, 409 Ill. App. 3d at 800, 949 N.E.2d at 247. At this point, the defendant told the court that his attorney was

ineffective for failing to "obtain records and information" that the defendant had told him would be helpful, failing to communicate with the defendant, and failing to "review helpful information." *Vargas*, 409 Ill. App. 3d at 800, 949 N.E.2d at 248. The court then went on to discuss the sentence it imposed "without even a hint of any response" to these claims. *Vargas*, 409 Ill. App. 3d at 801, 949 N.E.2d at 248.

¶ 21 On appeal, the First District explained that a trial court "may not simply ignore" *pro se* allegations of ineffective assistance of counsel. *Vargas*, 409 Ill. App. 3d at 801, 949 N.E.2d at 249. Because the trial court in *Vargas* conducted no inquiry at all, the appeals court, following *Moore*, found that it failed to make an adequate preliminary inquiry. *Vargas*, 409 Ill. App. 3d 802, 949 N.E.2d at 249.

¶ 22 Here, as in both *Moore* and *Vargas*, the court did not address the defendant's allegations of ineffective assistance at all. As in *Moore*, there is no way to tell on the record before us whether the court even read the letters, much less considered the allegations.

¶ 23 The defendant's letters alleged that counsel was ineffective for (1) failing to communicate with the defendant, (2) failing to present exculpatory evidence, and (3) failing to adequately cross-examine three of the State's witnesses. The letters also alleged that defense counsel was ineffective for failing to take adequate steps to ensure that the defendant was tried before a jury of his peers. Some of these claims could have been resolved without looking beyond the record. The defendant's claim that he was not tried before a jury of his peers lacks merit on its face, and the court could properly evaluate the adequacy of counsel's cross-examination of the State's witnesses based on the court's knowledge of defense counsel's performance at trial. See *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. On the record before us, however, there is no indication that the court actually considered either of these claims.

¶ 24 Moreover, the defendant's claim that counsel failed to present exculpatory evidence

could not be resolved without the type of brief exchange contemplated by our supreme court in *Moore*. Although the allegation lacks detail, a few simple questions could have given the court a better idea of what evidence the defendant claims counsel refused to present, which would have allowed the court to determine whether further investigation was needed. Because the court here conducted no inquiry at all, we find it necessary to remand this case so the court can do so.

¶ 25 The State argues, however, that the trial court did not have an obligation to conduct even a preliminary *Krankel* inquiry because the defendant's claims were vague and the defendant did not bring his letters to the court's attention at his sentencing hearing. See, *e.g.*, *People v. Radford*, 359 Ill. App. 3d 411, 416-17, 835 N.E.2d 127, 132 (2005); *People v. Sperow*, 170 Ill. App. 3d 800, 813, 525 N.E.2d 223, 232 (1988); *People v. Lewis*, 165 Ill. App. 3d 97, 109, 518 N.E.2d 741, 749 (1988). We disagree. The *Moore* court expressly rejected the waiver argument the State makes here. As the court explained, "a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638.

¶ 26 As we have already explained, we believe that the defendant's allegations contained sufficient detail to enable the court to ask a few simple questions to determine whether further inquiry was needed. See *Vargas*, 409 Ill. App. 3d at 802, 949 N.E.2d at 249 (reaching the same conclusion). We recognize that some courts have reached a contrary conclusion. In *Sperow*, the defendant wrote a letter to the court stating only, " 'I wish to have a Different Lawyer other than Mr. Reid present at my sentencing.' " *Sperow*, 170 Ill. App. 3d at 812, 525 N.E.2d at 231. Similarly, in *Lewis*, the defendant wrote a letter to the court in which he "generally claimed that he was not 'properly defended' by" his attorneys. *Lewis*, 165 Ill. App. 3d at 108, 518 N.E.2d at 748. We find both of these cases readily distinguishable from the case before us. The letter in *Lewis* contained nothing more than a general and conclusory

allegation that counsel was ineffective. The letter in *Sperow* did not even allege that counsel was ineffective.

¶ 27 In *Radford*, a defendant sent a letter to the trial court, stating, " 'if my witness was called and my lawyer would have did a halfway good job that I would be home with my family.' " *Radford*, 359 Ill. App. 3d at 414, 835 N.E.2d at 131. Although these allegations were far more general than many of the defendant's allegations in this case, the letter at least provided the court with enough information to enable it to ask relevant questions, such as who the witness was, how his or her testimony might have helped the defendant, and why the witness was not called. To the extent that *Radford* is inconsistent with *Vargas*, we find *Vargas* more persuasive and choose not to follow *Radford*. We find that the trial court was required to make a *Krankel* inquiry. Because it failed to do so, we remand so that the court can make an appropriate inquiry.

¶ 28 The defendant next argues that he is entitled to a credit of $5 per day against his fine for the 133 days he spent in custody before he was sentenced. See 725 ILCS 5/110-14 (West 2008). The State concedes that he is entitled to the credit, and we agree. We note that the trial court also found that the defendant was entitled to the credit, but it appears not to have been applied. Thus, on remand, the defendant will be entitled to a credit of $5 per day for 133 days for a total of $665 against either his $1,000 street value fine or his $3,000 drug assessment fine.

¶ 29 We conclude that the court erred in failing to conduct an inquiry into the defendant's allegations of ineffective assistance. In addition, we agree with both parties that one of the defendant's fines must be reduced to reflect a $5-per-day credit for time spent in custody before sentencing. Thus, we remand for further proceedings.

¶ 30 Cause remanded for further proceedings.